85-1917

Supreme Court, U.S.
FILED
MAY 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In the Supreme Court of the United States

October Term, 1985

IN RE: GRAND JURY SUBPOENA *DUCES TECUM*

GEORGE WILLIAM BILLS, JR., ESQ.,
and LARRY MICHAEL FARBER,

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN J. DEAN
SALLY A. FRICK
816 Fifth Avenue
Suite 500
Pittsburgh, Pennsylvania 15219
412/391-1350
Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I. Did the attorney Petitioner take sufficient and expeditious steps to bring his case within the reviewability exception to the mootness doctrine in a case where there is a constitutional question of the Sixth Amendment right to counsel and interference with the attorney-client relationship?

II. Did the grand jury subpoena directed to the attorney Petitioner substantially interfere with the attorney-client relationship in derogation of the Fifth and Sixth Amendment right to counsel?

III. Is the disclosure of the payment of attorney fees, which may implicate the client in the very criminal activity which is the subject of the grand jury investigation, privileged information and thus protected by the Sixth Amendment?

IV. Did the district court infringe upon the attorney-client relationship in derogation of the Fifth and Sixth Amendments in finding that the government proved the relevance of the information sought from the attorney without a showing of the particularized need for the information?

V. Should the grand jury subpoena directed to the attorney Petitioner be quashed because it is an abuse of the grand jury process in a constitutionally sensitive area, i.e., the constitutional right to counsel?

VI. Did the district court properly and completely require disclosure of electronic surveillance to which a grand jury witness is entitled?

PARTIES

The parties to this action are George William Bills, Jr., the attorney Petitioner, who was subpoenaed as a witness before the federal grand jury in the Western District of Pennsylvania; and Larry Michael Farber, Petitioner, who was the client-intervenor in the action in the district court. Because the action involved the grand jury and a subpoena issued upon application of the United States, the United States was a party both in the district court and in the Court of Appeals for the Third Circuit.

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Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on February 18, 1986.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit is impounded and is not reported, but is reprinted in Appendix A, infra.

JURISDICTION

The judgment of the Court of Appeals, panel decision, was entered on February 18, 1986. A timely petition for rehearing was denied by the Court of Appeals on March

20, 1986. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). Pursuant to Rules 20.1, 20.4 and 29.1 of the Rules of the United States Supreme Court, the time for filing a Petition for Writ of Certiorari began to run following the denial of the petition for rehearing on March 20, 1986 and expires on May 19, 1986, sixty days from the order denying rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Five to the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment Six to the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

On May 8, 1985, a grand jury subpoena was issued to G. William Bills, Jr., Esquire, to testify and to produce records concerning payments for legal services for or on behalf of three individuals: George Kost, Ronald Urban and Larry Michael Farber. On May 30, 1985, Mr. Bills filed a motion to quash the subpoena, request for a protective order and an injunction.

The motion to quash the subpoena and for a protective order and an injunction alleged several grounds in support of the motion: the failure of the government to file a *Schofield* affidavit, 486 F.2d 85 (3d Cir. 1973); the information sought was protected by the attorney-client privilege; the government was engaged in the wholesale issuance of subpoenas to criminal defense attorneys; and that the government was violating the rights of clients under the Fourth and Sixth Amendments to the United States Constitution.

Petitioner Bills also filed a motion for production, requesting information about his status as a possible target of the grand jury; disclosure of any electronic surveillance directed to him or to his counsel; and disclosure of internal memoranda regarding policy of the Justice Department towards the subpoena of attorney records.

A hearing was held on the motions filed by Petitioner Bills before United States District Judge Alan Bloch on June 11, 1985, pursuant to 28 U.S.C. §1826. At that hearing, counsel appeared for Petitioner Farber and was granted intervenor status by the district court. The district court refused, however, to permit counsel for Farber to be present at the hearing.

At the hearing, the district court, without testimony or argument, determined immediately that the requested information by the grand jury subpoena was not protected by the attorney-client privilege. However, the district court did determine that Petitioner Bills did represent Farber and Urban and thus there was the issue of a possible interference with the attorney-client relationship. Finally, the district court focussed on the need and the availability of the information requested from the attorney. The court equated need with relevance and availability as there being no other place to obtain the requested information.

On June 20, 1985, the district court issued an order directing that Petitioner Bills answer the proposed questions submitted by the United States. Counsel for the intervenor was not notified by the court of this order.

A notice of appeal, by both Petitioners, was filed with the United States court of Appeals for the Third Circuit on June 27, 1985, together with a motion for stay pending appellate review. On that same day, Petitioner Bills appeared before the grand jury and refused, on grounds of privilege and the other issues invoked by the motion to quash, to answer the questions submitted.

On July 1, 1985, following denial of the stay by the district court, and after oral argument before an emergency panel of the Court of Appeals, the Court of Appeals granted a partial stay pending appeal. After Petitioner Bills refused to answer the remaining questions, the district court adjudicated him in contempt and imposed a sentence of incarceration of eighteen months. The sentence was stayed for a period of time, during which time a notice of appeal from the citation for contempt was filed on behalf of Petitioner Bills. The United States subsequently

filed a motion before the district court to vacate the contempt citation, which was opposed by Petitioner. The district court, based on the fact that an affidavit had been submitted by Petitioner Bills disclosing the information requested, vacated the contempt citation following the filing of the notice of appeal to the Court of Appeals.

The two appeals, filed by both Petitioners from the ruling on the motion to quash and by Petitioner Bills on the citation for contempt, were consolidated for briefing and argument before the Court of Appeals.

Following oral argument before a panel of the Court of Appeals, the Court, in a *per curiam* opinion, found that the appeal of Petitioner Bills was rendered moot by his subsequent affidavit disclosing the requested information.

> "It is clear that Bills is without standing to prosecute either appeal. With respect to the first appeal, it is settled 'that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey.' *United States v. Ryan*, 402 U.S. 530, 531 (1971); *see also In Re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800-01 (3d Cir. 1979). [footnote omitted]. Thus, Bills' first appeal must be dismissed. Bills having complied with the subpoena as to the first two questions and thus purged himself of contempt, his appeal from the contempt has become moot and must likewise be dismissed. *Marshall v. Whittaker Corp.*, 610 F.2d 1141 (3d Cir. 1979). Although Bills argues that the district court was without jurisdiction to vacate its contempt order after his notice of appeal was filed, it was the fact of his compliance with the subpoena, and not any action by the district court,

that rendered his appeal moot. *See id.* at 1145. While this result obviously places a witness in something of a catch-22, any other result would create the potential for continual interferences with the grand jury's investigative function. Slip opinion at p. 4.

The Court of Appeals did, however, remand to the district court for further hearings, the intervenor's appeal from the district court's ruling on the motion to quash the subpoena because the intervenor had not been given an opportunity to appear and be heard at the hearing on that motion.

REASONS FOR GRANTING THE WRIT

I. PETITIONER CONTENDS HERE, AS HE DID IN THE COURT OF APPEALS, THAT THE CASE IS NOT MOOT BECAUSE PETITIONER TOOK SUFFICIENT AND EXPEDITIOUS STEPS TO BRING HIS CASE WITHIN THE REVIEWABILITY EXCEPTION TO THE MOOTNESS DOCTRINE IN A CASE WHERE THERE IS A CONSTITUTIONAL QUESTION OF THE SIXTH AMENDMENT RIGHT TO COUNSEL AND INTERFERENCE WITH THE ATTORNEY-CLIENT RELATIONSHIP.

It is clear that there are two reasons why this Court should review the decision of the Court of Appeals: There is a clear conflict among the Circuit Courts of Appeals concerning the reviewability of citations for contempt and this is an important question concerning the Sixth Amendment right to counsel and interference with the attorney-client privilege about which there is conflict. Additionally, the lower court decision is in conflict with other decisions of that Circuit, other Circuits and of this Court.

It is clear that there are three reviewability exceptions to the doctrine of mootness: whether an appellant has taken the necessary steps to perfect his appeal and preserve the status quo before the issue becomes moot; whether the trial court's order will have possible collateral consequences; and whether the dispute is of a nature that is capable of repetition yet evading review. *Sibron v. New York*, 392 U.S. 40, 88 S.Ct. 1889, 20 L.Ed.2d 917 (1968); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *DeFunis v. Odegaard*, 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976); *Super Tire Engineering Corp. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974).

This Court's rulings on the issue of mootness make it clear that jurisdiction is conferred, pursuant to Article III, §2 of the Constitution, and extends only to actual cases and controversies. This is to assure that the questions will be framed with the necessary specificity, that the issues will be contested with the necessary adverseness and that the litigation will be pursued with the necessary vigor to assure that the constitutional challenge will be made in a form traditionally thought to be capable of resolution. *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). The question to be asked is whether the case is ripe for decision on a fully developed factual record with sharply defined and fully canvassed legal issues. *Sibron v. New York, supra.*

Generally speaking, a case is moot when, after petitioner's service of his sentence and its expiration, there is no longer a subject matter on which the judgment of the Court can operate. *St. Pierre v. United States*, 319 U.S. 41, 63 S.Ct. 910, 87 L.Ed. 1199 (1943). In *St. Pierre*, this Court

refused to consider the merits of an appeal of a conviction for criminal contempt for that reason. While superficially it would appear that this holding controls the present case and numbers of cases preceding this case, the exceptions to the *St. Pierre* mootness rule have, to a large extent, dissipated its vitality. The Court in the *St. Pierre* case recognized that the petitioner there could have had his case reviewed before the expiration of his sentence, but no stay or supersedeas had been sought on his behalf. The Court thereby implied the first exception to the mootness rule—that an appeal is not moot even though the appellant has been released from custody or has served his sentence if he has taken all possible steps to have the order of confinement promptly reviewed prior to his release. In recognizing that exception to the mootness rule, the Court in *Sibron v. New York, supra,* said: "This was a plain recognition of the vital importance of keeping open avenues of judicial review of deprivations of constitutional rights." 392 U.S. 40, 51-52, 88 S.Ct. 1889, 1897, 20 L.Ed.2d 917 (1968).

This exception applies even when the most traditional of exceptions to the mootness doctrine—capable of repetition yet evading review—may not be applicable. The circumstances giving rise to *Roe v. Wade; supra, Super Tire Engineering Co. v. McCorkle, supra,* and *Nebraska Press Association v. Stuart, supra,* are also not capable of repetition. In each instance, the underlying dispute had ended. Just as the information in this case was disclosed, so the pregnancy in *Roe* had terminated; the labor dispute in *McCorkle* had been resolved and the publicity restraints in *Nebraska Press* had been lifted in a particular case. Yet in each of those instances, the Court found a capability of

repetition and rejected the suggestion of mootness, proceeding to the merits of the controversy.

While in each of those instances, the Supreme Court determined that capability of repetition existed, there is a view that such capability was perceived so as to satisfy the true governing consideration behind the Court's decision—that of having review available when significant interests are at stake. *United States v. Frumento*, 552 F.2d 534 (3d Cir. 1977). In *Frumento*, a co-defendant, who was an immunized witness, refused to testify at the trial of the other defendants. The district court found the witness (Pisciotta) in contempt and ordered him confined until the proceedings terminated or until he purged himself of the contempt by complying with the court's order. Pisciotta immediately applied for a stay and the application was denied. He then filed a notice of appeal and sought a stay of custody pending the outcome of his appeal of the district court's order. A panel of the Court of Appeals denied the motion for stay. During this time, the trial of the co-defendants ended and the panel of the Court of Appeals dismissed as moot the motion for a stay of custody, but retained jurisdiction of the direct appeal. The Court of Appeals held, under these circumstances, that the merits of the appeal were not moot despite the release of Pisciotta from custody, using both the capable of repetition exception and Pisciotta's prompt application for a stay as a reviewability exception:

> "We are satisfied that Pisciotta's confinement pursuant to an order of contempt, whether or not it is capable of repetition within the exact same framework, must not escape desired review any more than should 'gag orders' where the reason for the 'gag' no longer

> exists; pregnancies, where the pregnancies have terminated; or strikes, where the dispute has been settled. Indeed, conceding the importance of the economic, First Amendment, and personal interests discussed, we believe that even more weighty and deliberate consideration should be given to instances where personal liberty has been deprived." 552 F.2d at 540

In this case, similar interests in the protection of individuals' Sixth Amendment right to counsel and the attorney-client privilege as well as the individual attorney's right to personal liberty are at stake. This is especially so where the client-intervenor was denied access to litigate fully those rights and interests, and where the attorney-witness was indeed cited for contempt.

The decision of the court below also raises important questions of the ability to litigate fully such issues if the mootness ruling is permitted to stand. In a grand jury setting, where the government's interest is in the prompt and expeditious gathering of information and the interest of the witness and of the intervenor is in the protection both of personal liberty and constitutional rights, the power of the government and of the court to procure promptly that information, without the benefit of appellate review of the individual's rights, must give way. In a case such as the instant case, the government need only require of the attorney prompt disclosure of the information at the risk of his loss of liberty, and his license to practice law and to make a livelihood, without a stay for appellate review, and every case will be moot.

However, this situation has not arisen in at least one other circuit. In *In Re Grand Jury Proceedings in the Matter of Freeman*, 708 F.2d 1571 (11th Cir. 1983), the Court of Appeals held there that the merits of the case could be

considered despite the attorney's purging of the contempt citation prior to a decision by the Court. In that case, the district court held Bruce Randall, an attorney, in contempt for violating an order compelling his testimony before a grand jury. Randall refused to answer questions regarding the identities and fee arrangements of certain clients. He moved for a stay pending his appeal of the contempt citation on the ground that his testimony was protected by the attorney-client privilege. Client-intervenors also appealed the compulsion and contempts orders, as well as the denial of their motion to intervene. After temporarily staying the contempts order as to Randall, the Court of Appeals then vacated the stay and modified the district court's contempt order to give Randall an opportunity to purge his contempt by testifying before the grand jury. The Court was then notified that Randall had purged himself by testifying. However, the Court still considered the merits of the consolidated appeals of the attorney and his clients, for two reasons: "an opinion is appropriate to delineate our action in vacating the stay inasmuch as the chances of success on appeal were of paramount concern to the Court. Second, situations such as this are likely to occur again." 708 F.2d at 1573. The Court affirmed the contempt citation and, although it found that the district court erred in denying the motion to intervene, considered the case as though the district court had allowed intervention.

Thus, there is clearly conflict among the Circuit Courts as to the status of the witness-attorney and what must be done by him to promptly and expeditiously bring his case within the reviewability exception to the mootness doctrine.

II. THE GRAND JURY SUBPOENA DIRECTED TO THE ATTORNEY-PETITIONER SUBSTANTIALLY INTERFERES WITH THE ATTORNEY-CLIENT RELATIONSHIP IN DEROGATION TO THE FIFTH AND SIXTH AMENDMENT RIGHT TO COUNSEL.

Recently there appears to be a concerted effort by the government to serve upon defendants' lawyers grand jury subpoenas demanding fee information of clients who have been involved in criminal cases. Appellate cases on this subject have recently appeared in the first and second circuits and the issue has not recently been addressed by this Court.

A similar case to the instant case arose in New Hampshire when the government issued grand jury subpoenas to defense attorneys requesting fee information concerning targets of the investigation when the attorneys were engaged in a state trial defending the same individuals. *In Re Grand Jury Matters*, 593 F.Supp. 103 (New Hampshire, 1984). The district court quashed the subpoenas emphasizing the negative effect that the subpoenas would have on the attorneys' ability to defend their clients and that such disclosure would jeopardize the attorney-client relationship at a crucial point in the representation. The court also found that "the actions of the United States attorney are without a doubt harassing" and that enforcement of the subpoenas would deter attorneys from pursuing a career in criminal law because of the personal and professional trauma resulting from those tactics. The government appealed, but the First Circuit affirmed the ruling of the district court at *In Re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984).

A similar problem arose in the Second Circuit where the government again subpoenaed fee information from an attorney about his client who he had represented for some time. In that case, *In Re Grand Jury Subpoena (Doe)*, 759 F.2d 968 (2d Cir. 1985), the grand jury was investigating organized crime and wanted fee information including who had paid the attorney fees to show the existence of a criminal enterprise within the meaning of the RICO statute. The government admitted that if the attorney provided the information, he would subsequently be disqualified from representing any of the individuals in further proceedings. The government filed an affidavit describing the scope of the grand jury inquiry and the relevance of the materials sought to the inquiry. The district court denied the motion to quash the grand jury subpoena finding that the possibility of the attorney's eventual disqualification was far outweighed by the importance of presentation of evidence to the grand jury.

In a panel opinion reversing the district court decision, the Second Circuit held that potential infringement of the right to counsel must be only as a last resort and that two points support additional protection for the attorney-client relationship. "First the unbridled use of the subpoena would potentially allow the Government, in this and future cases, to decide unilaterally that an attorney will not represent his client. The unrestricted exercise of this power without adequate justification does not strike us as necessary or indispensable in an adversary system of criminal justice, particularly when we consider the signficance of the attorney-client relationship and the need for an independent bar. Second, as noted earlier, the right to have counsel of one's choosing in the defense of a criminal charge is of constitutional dimensions." 759 F.2d at 978.

The panel opinion in that case was then reversed, with two judges dissenting. *In Re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1986). The Court *en banc* recognized that the right to counsel, in addition to the provisions of the Sixth Amendment, is also protected by the due process clause of the Fifth Amendment. However, the Court refused to require that the government make a showing of need for the information before requiring testimony of an attorney about his client before the grand jury. However, certain other jurisdictions, including the Supreme Judicial Court of Massachusetts, have taken a different approach to this issue. In October, 1985, that Court adopted a new disciplinary rule which makes it unprofessional conduct for a prosecutor to issue a subpoena to a criminal defense attorney without obtaining prior judicial approval.

Significant to Chief Judge Feinberg in his dissenting opinion is the fact that requiring the government to show need in the important area of Sixth Amendment rights is not unusual. "There is similar burden on a party seeking information through subpoenas directed to members of the news media and in civil cases involving discovery of attorney's work product. (citation omitted). *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947). It seems obvious that a defendant's Sixth Amendment right is entitled to no less protection than a newspaper reporter's First Amendment right or an attorney's work product." 781 F.2d at 253. Judge Feinberg also was concerned with the majority's trivializing Sixth Amendment concerns: "while the witness before us is a lawyer, the crucial interests at stake belong to the whole community;"

The serious concerns expressed by the dissenters that once the determination of the highly probative value of the

evidence requested from the attorney, the Sixth Amendment carries no weight at all, is a serious constitutional consideration which mandates review by this Court.

While these various appellate decisions have considered the problems of interfering with the attorney-client relationship, they have not dealt squarely with the significant issues of disruption and the effect that the government subpoenas can have upon the criminal justice system and this Court is urged to address those issues. The subpoenas generate a conflict of interest between an attorney and his client when the attorney's interest lies in avoiding the potential contempt or offering less than full effort in avoiding the subpoena. One cannot overlook the obvious caution and reluctance that occurs when a client realizes that the attorney to whom he turns for advice and who asks that he place all of his confidence, now becomes the instrument of his destruction. But perhaps the most important issues is the chilling message sent by the government pattern of attorney subpoenas that if an attorney undertakes to represent criminal defendants he himself may soon become the subject of a grand jury subpoena with the concomitant publicity and cloud of suspicion.

III. THE DISCLOSURE OF THE PAYMENT OF ATTORNEY FEES, WHICH MAY IMPLICATE THE CLIENT IN THE VERY CRIMINAL ACTIVITY WHICH IS THE SUBJECT OF THE GRAND JURY INVESTIGATION, IS PRIVILEGED AND DISCLOSURE IS A VIOLATION OF THE SIXTH AMENDMENT.

While admittedly fee information is generally not privileged between attorney and client, there are certain

enumerated exceptions to that rule and all of these exceptions revolve around the harm that may befall the client when the information is disclosed by his attorney.

In this case, during the hearing before the district court, the government admitted that they wanted the information from the attorney Petitioner to implicate the intervenor-client Petitioner in a continuing criminal enterprise, RICO violations and tax violations and that the information would be used against the named individuals.

Where the information is not confidential and is not necessary to obtain informed legal advice for the client, no privilege exists. *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). However, when the communication—by payment of fee—would by its nature be a disclosure of identity, the information is privileged. In *United States v. Liebman*, 742 F.2d 807 (3d Cir. 1984), the Third Circuit held that disclosure by counsel of fee arrangements would implicate the clients in possible criminal activity. The Fifth Circuit has also held that payment of fees and disclosure of that information may be privileged:

> "Just as the client's verbal communications are protected, it follows that other information, not normally privileged, should also be protected when so much of the substance of the communications is already in the government's possession that additional disclosures would yield substantially probative links in an existing chain of inculpatory events or transactions. 517 F.2d at 674. *In Re Grand Jury Proceedings (Jones)*, 517 F.2d 666 (5th Cir. 1975).

The Third Circuit has also recognized that "such information might be protected, however, if the persons asserting the privilege can show a strong probability that

disclosure of the fact of retention or of the details of a fee arrangement would implicate the client in the very criminal activity for which legal advice was sought." *In Re Grand Jury Investigation (Tinari)*, 631 F.2d 17 (3d Cir. 1980).

IV. THE DISTRICT COURT INFRINGED UPON THE ATTORNEY-CLIENT RELATIONSHIP IN DEROGATION OF THE FIFTH AND SIXTH AMENDMENTS IN FINDING THAT THE GOVERNMENT PROVED THE RELEVANCE OF THE INFORMATION SOUGHT FROM THE ATTORNEY WITHOUT SHOWING THE PARTICULARIZED NEED FOR THE INFORMATION.

As the issues and arguments are similar, Petitioners incorporate herein by reference the arguments raised in Issue II herein.

Petitioners again urge this Court to consider the standard required prior to issuance of a grand jury subpoena to an attorney for information regarding his client. As more fully discussed in Issue II herein, there is some conflict among various jurisdictions as to the necessity that the government show a particularized need for that particular information prior to requiring that the attorney disclose the information. In any event, there is a need for the courts to be provided with a balancing test, with appropriate standards, of the government's need for the information against the rights of the client pursuant to the Sixth Amendment and the rights of the attorney to personal liberty and his duty to protect his client's interest.

In this particular case, the district court continually confused the two issues of need and relevance. The court requested that the government "make some preliminary

showing of the relevancy of the information that they are seeking and their inability to get that information from any other source than Mr. Bills." The court reiterated on several occasions the government's inability to obtain the information from other sources as providing the relevance necessary to the inquiry.

As the dissenting opinion of Judge Cardamone, in *In Re Grand Jury Subpoena Served Upon Doe*, 781 F.2d 238 (2d Cir. 1986), observed: "At issue is not whether the government may subpoena a lawyer, but whether the prosecutor must first show a need for the lawyer's testimony before it subpoenas him. To forge ahead without a showing of need may rid society of some criminals, yet of greater concern is the fact that when the government deems it sufficiently expeditious, perhaps other rights—established in long hard-fought legal battles—may now be jeopardized.

Because the Sixth Amendment right to counsel has been a corner-stone of our judicial system since before the adoption of the Constitution and the Bills of Rights, it should not lightly be abrogated in any manner. The right to counsel and the privilege which attaches to that right of confidential communications between attorney and client is of such critical importance to our adversary process that it cannot be denied without violating those fundamental liberties which form the base of our civil and political institutions. In addition, as the majority noted in the *Doe* opinion, the Fifth Amendment guarantee of due process also works to provide the right to counsel and that a defendant be afforded a fair opportunity to obtain the assistance of counsel of his choise. Judge Cardamone argues that the right to a fair trial and choice of counsel embodied in the due process clause of the Fifth Amendment "may, in some circumstances, come into play at a point earlier in time

than the Sixth Amendment right to counsel." 781 F.2d at 258. Judge Cardamone also notes that, although the information sought is not necessarily privileged, a court's inquiry should not end there. The privilege exists to encourage full and truthful communication between attorneys and their clients and "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Compelling an attorney to testify against his client, even concerning unprivileged information, whether or not any governmental need for that testimony exists and is fully and adequately demonstrated, so disrupts the human feelings of trust and confidence as to later and permanently inhibit the client from freely confiding in his attorney information that is, in fact, privileged." 781 F.2d at 260.

V. THE GRAND JURY SUBPOENA DIRECTED TO THE ATTORNEY PETITIONER SHOULD BE QUASHED BECAUSE IT IS AN ABUSE OF THE GRAND JURY PROCESS IN A CONSTITUTIONALLY SENSITIVE AREA, I.E. THE CONSTITUTIONAL RIGHT TO COUNSEL.

The Third Circuit Court of Appeals has recognized that the grand jury is basically a tool of the government and that the Courts only enter the grand jury process in dealing with a recalcitrant witness who requires immunity or one who resists a subpoena through motions or contempt. *In Re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973).

An abuse of the process occurs when the government utilizes that process as a vehicle for a "fishing expedition."

In this case, the government subpoenaed at least six attorneys before the grand jury trying to obtain fee information on three named individuals. The government made no showing, nor was a showing required, of probable cause as to why any of the attorneys subpoenaed would have such information.

It appears that this wholesale tactic of grand jury subpoenas to attorneys is being employed in various other districts, including Atlanta and New Hampshire, as well as in New York. See *In Re Grand Jury Matters*, 751 F.2d 13 (1st Cir. 1984); *In Re Grand Jury Subpoena Served Upon Doe, supra*. In the First Circuit case, the Court noted that it is important that the government indicate to the attorney-witness whether or not he is considered to be a target of the investigation: "It might also be very different were this not a case in which the United States Attorney has conceded that he had never suggested that any of the attorneys here is somehow engaged in improper conduct themselves with regard to this particular matter." 751 F.2d at 19.

However, in the instant case, the government did not disclose whether or not the attorney Petitioner was a potential target of the investigation to which he was subpoenaed to provide information. Thus there was no showing by the government nor finding by the district court that there was no abuse of the process in requiring this information from the attorney Petitioner. Significant also is the fact that Petitioner Farber was under indictment on other charges while the grand jury matters were pending. It is clear that the government cannot use the grand jury process to obtain information to be used in a pending trial against an individual; timing of the issuance of the subpoena is important. *In Re Grand Jury Subpoena Duces*

Tecum Dated January 2, 1985 (Simels), 767 F.2d 26 (2d Cir. 1985).

VI. THE DISTRICT COURT DID NOT PROPERLY AND COMPLETELY REQUIRE DISCLOSURE OF ELECTRONIC SURVEILLANCE TO WHICH A GRAND JURY WITNESS IS ENTITLED.

The attorney Petitioner in this case, who was the subpoenaed grand jury witness, filed a motion for production and disclosure of any electronic surveillance, accompanied by the appropriate affidavit. The government, in response, filed a conclusory statement denying that the subpoena was derived in any manner from any nonconsensual electronic surveillance. The government, in effect, removed the fact-finding perogative from the district court by not presenting the court with any facts upon which the court could make its own determination as to the derivative aspect of the subpoena.

The question of the rights of grand jury witness to challenge illegal electronic interception was unclear until this Court's decision in *Gelbard v. United States*, 408 U.S. 41 (1972). That case involved the civil contempt proceeding of a grand jury witness who refused to testify because he alleged that the interrogation was based upon illegal electronic surveillance. Until *Gelbard*, there was disagreement among the circuits concerning the right of a grand jury witness to raise the claim of illegal electronic surveillance. This Court held that a witness could challenge the surveillance and that "the opponent of the claim must affirm or deny the occurrence of the alleged unlawful act." 408 U.S. at 57.

Several circuits have then reviewed the sufficiency of the government's showing in accordance with *Gelbard*. In

Beverly v. United States, 468 F.2d 732 (5th Cir. 1972) once the witnesses alleged electronic surveillance, and the government failed to fully respond, the court vacated the citations for civil contempt. In *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), once the witness established a *prima facie* showing of his belief of the existence of electronic surveillance, the burden was then on the government squarely to affirm or to deny those charges. The government in that case then submitted an affidavit that an official inquiry was made with appropriate federal agencies to determine the existence of any electronic surveillance and there had been no electronic surveillance, based on that inquiry. The Court held that this affidavit was insufficient to meet the *prima facie* showing in that the affiant spoke in conclusionary terms.

The Third Circuit has also reviewed the sufficiency of government affidavits in response to a claim by a grand jury witness of electronic surveillance. In *In Re Horn*, 458 F.2d 468 (3d Cir. 1972), the Court required that the government set forth a complete affidavit showing whether there had been any wiretapping and what specific governmental agencies were contacted to make that determination. No such affidavit or showing was made in this case that appropriate federal agencies were contacted to determine that no electronic surveillance had occurred and that the grand jury subpoena could not therefore be a product of any electronic surveillance.

CONCLUSION

For all the foregoing reasons, Petitioners request that this Court grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

JOHN J. DEAN
SALLY A. FRICK
816 Fifth Avenue
Suite 500
Pittsburgh, Pennsylvania 15219
412/391-1350
Attorneys for Petitioners

May 19, 1986

APPENDIX A

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 85-3365 and 85-3376

IN RE: GRAND JURY SUBPOENA DUCES TECUM
G. William Bills, Jr., Esq.

George William Bills, Jr., Esquire
Witness above-named and Larry Michael Farber, Intervenor,
Appellants in No. 85-3365

GEORGE WILLIAM BILLS, JR., ESQ.,
Appellant in No. 85-3376

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (MISC. NO. 12084)

Argued January 14, 1986 (Filed February 18, 1986)

Before: SEITZ and GIBBONS, *Circuit Judges*,
and BARRY, *District Judge**

JOHN J. DEAN (ARGUED)
816 Fifth Ave., Suite 500
Pittsburgh, PA 15219
Attorney for Appellants

PAUL J. BRYSH (ARGUED)
Assistant U.S. Attorney
633 Old Post Office
& Courthouse
Pittsburgh, PA 15219
Attorney for Appellee,
U.S. Government

*Hon. Maryanne Trump Barry, of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

PER CURIAM.

G. William Bills, Jr., and Larry Michael Farber appeal in no. 85-3365 from an order of the district court denying a motion to quash a grand jury subpoena and a related motion for production. In no. 85-3376, Bills also appeals an order of the district court judging him in contempt for refusing to testify before a grand jury pursuant to the same subpoena. Jurisdiction is alleged to be based on 28 U.S.C. §1291 (1982).

I

A grand jury in the Western District of Pennsylvania issued a subpoena duces tecum to appellant Bills, an attorney, directing him to appear and produce documents "reflecting receipt of payments for legal services for or on behalf of" three named individuals, including appellant Larry Michael Farber. Bills filed a motion in the district court to quash the subpoena. The motion alleged, *inter alia*, that compliance with the subpoena would interfere with the attorney/client privilege and violate his clients' Sixth Amendment right to counsel. He also filed a motion for production, alleging that the subpoena was derived from illegal electronic surveillance. The Government filed a response including a *Schofield* affidavit, *see In re Grand Jury Proceedings (Schofield)*, 486 F.2d 85 (3d Cir. 1973); a denial that the subpoena was derived from non-consensual electronic surveillance[1]; and a list of questions it proposed to put to Bills. The questions were: whether Bills had provided legal services to any of the three individuals named

[1]The Government later stated orally that no electronic surveillance had taken place, and the district court so found.

in the subpoena; as to each, the amount and form of payment of any fees; and a request for "any documents which reflect the payment, receipt, deposit, transfer or investment of any fees received."

The district court held a hearing on Bills' motions. Although Farber was granted intervenor status, his counsel was not permitted to participate in the proceedings, apparently through inadvertance; nor was Farber himself present. Following the hearing, the court entered an order denying Bills' motions and directing Bills to comply with the subpoena. Bills and Farber appealed, and a motions panel of this court issued a stay with respect to the third proposed question (the request for documents). The panel reserved for the merits panel, however, the question of the appealability of the district court's order. This appeal by Bills and Farber is now before us at no. 85-3365.

Bills then appeared before the grand jury but refused to answer the two questions that the motions panel had not stayed. After a further hearing, he was cited for civil contempt. The contempt was short-lived, however; upon being handcuffed in the courtroom by a marshal, Bills indicated that he was ready to comply with the subpoena. He subsequently filed an affidavit in answer to the first two questions, thus purging himself of the contempt. Soon thereafter, Bills filed a notice of appeal of the contempt order, which is before us at no. 85-3376. After the filing of the notice of appeal, the district court, on motion of the government, vacated its earlier contempt judgment. The appeals at nos. 85-3365 and 85-3376 were consolidated for argument.

II

It is clear that Bills is without standing to prosecute either appeal. With respect to the first appeal, it is settled "that one to whom a subpoena is directed may not appeal the denial of a motion to quash that subpoena but must either obey its commands or refuse to do so and contest the validity of the subpoena if he is subsequently cited for contempt on account of his failure to obey." *United States v. Ryan*, 402 U.S. 530, 532 (1971); *see also In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 800-01 (3d Cir. 1979).[2] Thus, Bills' first appeal must be dismissed. Bills having complied with the subpoena as to the first two questions and thus purged himself of contempt, his appeal from the contempt order has become moot and must likewise be dismissed. *Marshall v. Whittaker Corp.*, 610 F.2d 1141 (3d Cir. 1979). Although Bills argues that the district court was without jurisdiction to vacate its contempt order after his notice of appeal was filed, it was the fact of his compliance with the subpoena, and not any action by the district court, that rendered his appeal moot. *See id.* at 1145. While this result obviously places a witness in something of a catch-22, any other result would create the potential for continual interferences with the grand jury's investigative function.

Unlike Bills, Farber, as an intervenor, has standing to appeal the district court's denial of a motion to suppress. *FMC Corp.*, 604 F.2d 800-01. We do not reach the merits of Farber's appeal, however, because we believe that Farber should have been given the opportunity to present his claims to the district court in the first instance. The government concedes that the exclusion of Farber's counsel

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[2]The district court's denial of Bills' other motions was also not appealable. *In re Horn*, 458 F.2d 468, 470 n.6 (3d Cir. 1972).

from the hearing was erroneous, but argues that any error was harmless. We disagree. Since a primary purpose of intervention is to permit the intervenor to protect an interest which will not otherwise be adequately represented by the original parties, *see* Fed. R. Civ. P. 24(a), it would be anomalous to hold that it can be harmless error to deny an intervenor the opportunity to participate in the proceedings. Thus, it is immaterial that Bills' attorney may have argued strenuously and skillfully for the same position espoused by Farber, since Bills' attorney neither purported to nor did he in fact represent Farber. *Cf. United States v. Rankin*, no. 84-1562, slip op. at 10-11 (3d Cir. Jan. 6, 1986) (where defendant is improperly denied the right to be represented by counsel of his choice, it is irrelevant that he may have been competently represented by appointed counsel, since harmless error doctrine is inapplicable). Farber's appearance at the appellate level is no substitute for the opportunity to argue his case to the district court, particularly where, as here, our scope of review is limited. *See In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1985) (district court's orders granting or denying motions to quash subpoenas entitled to great deference). Accordingly, we will remand to permit the district court to rule on Farber's claims. We leave to the district court in the first instance the determination of whether Bills' compliance with the subpoena has rendered any of Farber's claims moot.

The Bills appeals in nos. 85-3365 and 85-3376 will be dismissed. The district court's order denying the motion to quash, and other motions to which Farber was a party, will be vacated, and the case will be remanded to permit Farber to be heard on those motions.

To the Clerk: Please file the foregoing per curiam opinion.

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Circuit Judge

APPENDIX B

United States Court of Appeals

FOR THE THIRD CIRCUIT

Nos. 85-3365 and 85-3376

IN RE: GRAND JURY SUBPOENA DUCES TECUM
G. William Bills, Jr., Esq.

George William Bills, Jr., Esquire
Witness above-named and Larry Michael Farber, Intervenor,
Appellants in No. 85-3365

GEORGE WILLIAM BILLS, JR., ESQ.,
Appellant in No. 85-3376

(Misc. No. 12084 - W. D. of Pa.)

SUR PETITION FOR REHEARING

PRESENT: ALDISERT, *Chief Judges*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, *Circuit Judges* and BARRY, *District Judge.**

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

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*Hon. Maryanne Trump Barry, United States District Judge for the District of New Jersey, sitting by designation.

rehearing by the court in banc. the petition for rehearing is denied.

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Dated: March 20. 1986 *Circuit Judge*